

Brito v HKAL 34th St. LP

2024 NY Slip Op 32451(U)

July 19, 2024

Supreme Court, New York County

Docket Number: Index No. 157710/2022

Judge: Arthur F. Engoron

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART 37

Justice

-----X
JERRY BRITO,

Plaintiff,

INDEX NO. 157710/2022
MOTION DATE 05/29/2024
MOTION SEQ. NO. 001

- v -

HKAL 34TH STREET LIMITED PARTNERSHIP, THE
KIBEL COMPANIES, LLC, TALISEN CONSTRUCTION
CORPORATION, ANDAMIO SCAFFOLDING LLC,

Defendants.

**DECISION + ORDER ON
MOTION**

-----X
HKAL 34TH STREET LIMITED PARTNERSHIP, THE KIBEL
COMPANIES, LLC,

Plaintiffs,

First Third-Party Action
Index No. 595156/2023

-against-

STANDARD WATERPROOFING CORP.,

Defendant.
-----X

Second Third-Party Action
Index No. 595465/2023

STANDARD WATERPROOFING CORP.,

Plaintiff,

-against-

CITI CONTRACTING SERVICES, CORP.,

Defendant.
-----X

Third Third-Party Action
Index No. 596039/2023

STANDARD WATERPROOFING CORP.,

Plaintiff,

-against-

IMPECCABLE CONSTRUCTION SERVICES, INC.,

Defendant.
-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion for

DEFAULT JUDGMENTS

Upon the foregoing documents, and for the reasons stated hereinbelow, the motion, pursuant to CPLR 3215(b), for default judgments against second and third third-party defendants is granted.

Background

On June 16, 2021, first third-party defendant/second and third third-party plaintiff, Standard Waterproofing Corp. (“Standard”), contracted with defendants/third-party plaintiffs, HKAL 34th Street Limited Partnership (“HKAL”) and The Kibel Companies, LLC (“Kibel”), to work on a construction project located at 300 East 34th Street, New York, New York 10016 (“the Project”). NYSCEF Doc. No. 18 Ex. C. The contract required that Standard “indemnify and hold harmless [HKAL and Kibel] ... and agents and employees of any of them from and against claims, damages, losses and expenses.” NYSCEF Doc. No. 18 Ex. C.

On October 25, 2021, Standard contracted with second third-party defendant, Citi Contracting Services Corp. (“Citi”) for the latter to work on the Project. That contract contains an indemnification clause (“[Citi] shall defend and shall indemnify and hold harmless, at [Citi’s] sole expense, [Standard] ... excluding only liability created by the sole and exclusive negligence of the Indemnified Parties.”) and an insurance clause (“[Citi] shall procure and shall maintain until final acceptance of the [Project], such insurance as will protect [Standard].”). NYSCEF Doc. No. 76.

On December 14, 2021, Citi contracted with third third-party defendant, Impeccable Construction Services Inc. (“Impeccable”). That contract contains (1) an indemnification clause and (2) an insurance clause. (“[Impeccable] agrees to indemnify, defend and hold harmless [Citi], ... and any other person or entity whom [Citi] is required to defend, indemnify and hold harmless and/or for whom Citi is performing work,” limited, in the event of negligence, to “any liability imposed over and above that percentage attributable to actual fault of Indemnitee.”) Id.

Plaintiff, Jerry Brito (“Brito”), alleges that on June 8, 2022, he was injured at the Project while Standard employed him. NYSCEF Doc. No. 61.

Procedural History

On September 9, 2022, Brito sued defendants, HKAL, Kibel, Talisen Construction Corporation, and Andamio Scaffolding, LLC, asserting five causes of action; negligence, violation of New York Labor Law §§ 200, 240(1), 421(6); and the Industrial Code of New York. NYSCEF Doc. No. 61.

On February 17, 2023, HKAL and Kibel filed a third-party action against Standard. NYSCEF Doc. No. 66.

On May 22, 2023, Standard, filed a second third-party action against Citi, asserting four causes of action: (1) common law indemnification; (2) common law contribution; (3) contractual indemnification; and (4) failure to procure insurance. NYSCEF Doc. No. 69.

On June 9, 2023, Standard served Citi, pursuant to BCL § 306, via the New York Secretary of State. NYSCEF Doc. No. 70. In a letter dated July 11, 2023, Standard gave Citi notice of default. NYSCEF Doc. No. 78.

On November 15, 2023, Standard filed third third-party action against Impeccable, asserting four causes of action: (1) common law indemnification; (2) common law contribution; (3) contractual indemnification; and (4) failure to procure insurance. NYSCEF Doc. No. 72.

On November 29, 2023, Standard served Impeccable, pursuant to BCL § 306, via the New York Secretary of State. NYSCEF Doc. No. 73. In a letter dated January 9, 2024, Standard gave Impeccable notice of Impeccable's default. NYSCEF Doc. No. 78. In a letter dated February 25, 2024, Standard notified Citi a second time that time to respond to the second third-party complaint had passed. NYSCEF Doc. No. 78.

On May 29, 2024, Standard filed the instant motion for default judgements against Citi and Impeccable, with damages to be assessed at the conclusion of the action. NYSCEF Doc. No. 59.

Discussion

To obtain a default judgement, a plaintiff must submit proof of service of the summons and complaint, the facts constituting the claim, the default, and the amount due. CPLR 3215.

"Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists." Woodson v Mendon Leasing Corp., 100 NY2d 62, 70-71 (2003).

CPLR 3012 (a) requires that after a complaint has been served, "Service of an answer or reply shall be made within twenty days after service of the pleading to which it responds."

Indemnity is to be applied to the extent that a contract establishes it. Margolin v New York Life Ins. Co. 32 NY2d 149 (1973). Here, the underlying contracts state that the extent of indemnification in the event of liability is conditional on Standard's negligent or non-negligent actions. NYSCEF Doc. Nos. 76, 77.

As the indemnification and insurance clauses in the underlying contracts are clear, and as neither Citi nor Impeccable has answered, or otherwise appeared in this action, and as their time to do so has passed, this Court must grant Standard's motion for default judgements against them.

Conclusion

Thus, the instant motion of the second and third third-party plaintiff, Standard Waterproofing Corp., for default judgments against the second third-party defendant Citi Contracting Services

Corp., and the third third-party defendant Impeccable Construction Services, Inc., is hereby granted on liability; an assessment of damages is to be held at the conclusion of the instant action should any award be entered against Standard Waterproofing Corp.; and the Clerk is hereby directed to enter judgment accordingly.

HON. ARTHUR F. ENGORON



7/19/2024

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE